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In the Supreme Court of the United States

OCTOBER TERM, 1978

NATTER MANUFACTURING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 580 F. 2d 948. The decision and order of the National Labor Relations Board (Pet. App. 13-26) are reported at 221 N.L.R.B. 13 (1975).

JURISDICTION

The judgment of the court of appeals was issued on September 27, 1978. The petition for a writ of certiorari was filed on November 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that petitioner failed to present sufficient evidence of race or sex discrimination by a union to entitle it to an evidentiary hearing on its

objection to the certification of the union as the representative of petitioner's employees.

STATEMENT

1. Petitioner manufactures and sells fabricated metal products. Local 170 of the Sheet Metal Workers' International Association won a Board-conducted representation election among petitioner's production and maintenance employees. Petitioner then filed a motion with the Regional Director to disqualify Local 170 from certification as the employees' bargaining representative on the ground that it "has traditionally and is presently engaged in practices which discriminate on the basis of race, sex, religion and national origin" (R. 178-179).[1] Petitioner requested a hearing on its allegation (R. 178).

In support of its claim, petitioner cited "a number of court cases wherein different local unions associated with the International, as well as the International itself, have been found guilty of unlawful racial discrimination" (R. 206). It also asserted that between 1967 and 1971 less than 1% of those referred to construction jobs in California by various Sheet Metal Workers local unions were black.[2] Petitioner added that "this record of discrimination on the part of the local unions is a direct result of the control that the Sheet Metal Workers International Association has over local unions" citing various provisions of the International constitution (R. 206).

2. The Regional Director denied petitioner's motion and certified Local 170 as the bargaining representative of the unit employees (R. 205-211). Rejecting petitioner's

[1]"R." refers to the bound volume of the record materials filed with the court of appeals.

[2]These figures did not include Local 170, which is a "production" local, not a "construction" local.

assertion that discriminatory behavior by other locals or the International was evidence of the same conduct by Local 170, the Regional Director stated (R. 207-208):

> a local union is a legal entity apart from its International and not merely an arm of the latter. To attribute the alleged unlawful conduct of other local unions associated with the International to the Union will be tantamount to subscribing to the concept of guilt by association. Even the assertion that the International dominates the Union to the extent of making the Union an appendage of the International has no basis. The provision of the International Constitution places restraints upon the activities of the Union, but does not deny its separate existence nor make it an administrative arm of the International. [Citation omitted.]

The Regional Director also denied petitioner's request for a hearing. He explained that under Section 102.69 of the Board's Rules and Regulations, 29 C.F.R. 102.69, "the objecting party must supply specific evidence which *prima facie* would warrant setting the election aside," and "a hearing is not a matter of right unless substantial and material issues are raised." He concluded that here petitioner had "failed to provide any probative evidence which would establish a *prima facie* case that the Union has engaged in racial or other forms of invidious discrimination" (R. 209).

The Board denied petitioner's request for review of the Regional Director's decision (R. 263). In the ensuing unfair labor practice proceeding, petitioner renewed its objection that the union's alleged discriminatory policies should have precluded its certification. The Board again rejected this contention and found that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the union (Pet. App. 22).

3. The court of appeals enforced the Board's bargaining order (Pet. App. 1-9). Rejecting petitioner's contention that it was entitled to an evidentiary hearing, the court noted that, in order to obtain a hearing on an objection to an election, "the objecting party must make a *prima facie* showing, presenting 'substantial and material factual issues' that would warrant setting aside an election" (Pet. App. 7). In this case, the court concluded, petitioner "has presented no *facts* which would establish a *prima facie* case that this particular union is guilty racial discrimination" (*id.* at 8; emphasis in original). Petitioner's references to decisions involving the Sheet Metal Workers' International Association and other affiliated locals was not enough to carry its burden, the court held, absent some showing that Local 170 was dominated by the International or by another local that engaged in discrimination (*ibid.*).

ARGUMENT

1. Petitioner first contends that the Board may not constitutionally certify a union that discriminates unlawfully on the basis of race or sex (Pet. 7-14). That question, however, is not presented in this case, because, under the Board procedures applicable at the time of this proceeding, the Board would not have certified the union if petitioner had established that the union in fact engaged in race or sex discrimination.[3] Under established principles, which petitioner does not challenge (see Pet. 14-15), a hearing on post-election objections is available only if the objecting party makes a *prima facie* showing of

[3]In *Bekins Moving & Storage Co. of Florida, Inc.*, 211 N.L.R.B. 138 (1974), the Board, relying on constitutional principles and the decision in *National Labor Relations Board* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (8th Cir. 1973), announced that "if properly substantiated objections to the issuance of a certification are filed," it would not "confer the benefits of a certification upon a labor organization which is shown to be engaging

substantial and material factual issues which, if resolved in the objecting party's favor, would warrant setting aside the election. Applying that well-settled rule here, the Board, upheld by the court of appeals, concluded that petitioner failed to make a *prima facie* showing that Local 170 had engaged in discriminatory practices.

Thus, the only issue presented in this case is whether the Board was correct in determining that petitioner's factual showing fell short. That factual question does not warrant review by this Court. In any event, there is no merit to petitioner's contention (Pet. 15-19) that it made the requisite *prima facie* showing.

Petitioner presented no evidence that Local 170 engages in discrimination. It produced no affidavits from employees at other plants represented by Local 170 or from its own employees describing incidents of racial or other discrimination involving Local 170. Rather, petitioner claims that a *prima facie* case of discrimination by a local union is established where other locals of the same union and the national union previously have been found to have engaged in discriminatory practices.

The petitioner cites no authority to support this proposition. Indeed, the only directly applicable precedent is to the contrary. In *National Labor Relations Board* v. *Bancroft Mfg. Co.*, 516 F. 2d 436 (5th Cir. 1975), cert. denied, 424 U.S. 914 (1976), the court upheld the Board's refusal to enforce an employer's subpoena *duces tecum* for records relating to the numbers of whites and

in a pattern and practice of invidious discrimination * * * such as excluding persons from membership on the basis of race, alienage, or national origin [,] * * * [or] which is shown to have a propensity to fail fairly to represent employees." *Id.* at 138-139, 141. Since this decision was controlling at the time of the instant proceeding, there is no occassion to determine the validity of the Board's subsequent ruling in *Handy Andy, Inc.*, 228 N.L.R.B. 447 (1977), that it would no longer entertain allegations of union discrimination in representation proceedings, but would defer such contentions to unfair labor practice or revocation of certification proceedings.

blacks in the national union, where the employer's allegations of discrimination were supported only by evidence of discrimination by other locals. The court stated (516 F. 2d at 447):

> We have seen that *Mansion House* and *Bekins* [note 3, *supra*] were concerned primarily with discriminatory membership and representation policies at the local level, hence, it would be logical to assume that the Company would have come forward with at least some evidence or allegation that this particular local engages in such practices. The Company did not do so; rather, it sought to tie the membership practices of an industrial local in Mississippi to those of construction locals in Illinois.

Similarly, in this case petitioner's unsubstantiated allegation that only 1% of the construction workers referred in California by Sheet Metal Workers locals in preceding years were black was irrelevant, since Local 170 is a production local, having nothing to do with dispatching workers to construction jobs[4] (R. 206-207). *National Labor Relations Board* v. *Mansion House Center Management Corp.*, 473 F. 2d 471 (8th Cir. 1973), on which petitioner relies (Pet. 17), does not support its position. The court remanded that case to the Board for a further hearing because the hearing examiner had excluded statistical evidence bearing on the discriminatory practices of the local union that was seeking certification. As noted above, no such offer of proof regarding the practices of Local 170 was made here.

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[4]Petitioner's assertion (Pet. 17) that the Sheet Metal Workers International constitution precludes members of "production" locals from transferring to "construction" locals is erroneous. The constitution (Article Twenty-two, Section 10(b)) permits production local workers to transfer to a building and construction trades local union if they can demonstrate that they can perform the work done by that local. Moreover, petitioner presented no evidence that Local 170 or any other local engages in invidious discrimination against persons seeking such transfers.

Finally, there is no merit in petitioner's contention (Pet. 18-19) that the control exercised by the International over affiliated locals justifies the inference that if the former has been found to engage in discriminatory practices the latter has likely done so as well. Petitioner cites no instance in which the International required an affiliated local to adhere to a discriminatory policy. The provisions of the International constitution that require local unions to abide by the provisions of the constitution (Pet. 18) do not help petitioner, since the constitution does not in any way require or condone race or sex discrimination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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